



PROJECT MUSE®

United States Policy toward Enemy Detainees in the "War on Terrorism"

David P. Forsythe

Human Rights Quarterly, Volume 28, Number 2, May 2006, pp. 465-491 (Article)

Published by Johns Hopkins University Press

DOI: <https://doi.org/10.1353/hrq.2006.0017>



➔ *For additional information about this article*

<https://muse.jhu.edu/article/196897>

United States Policy toward Enemy Detainees in the “War on Terrorism”

*David P. Forsythe**

ABSTRACT

The democratic government of France in the Algerian war engaged in torture and summary execution of enemy detainees. In so doing, it generated increased opposition at home and abroad. Torture may have helped the French win the battle of Algiers, but France lost the war for Algeria. French abuses of human rights in that war also cost the French dearly in terms of loss of self respect and reputation in the world. The Bush Administration, in fighting its “war on terrorism,” runs the danger of repeating much of the French experience. It has intentionally abused many detainees in many places and has failed to ensure that this abuse is limited to persons truly presenting a dire threat to the security of US democracy. It has also tried to minimize authoritative review of its interrogation policies. Whether this broad policy of abuse can be sustained, and whether it can avoid the many negatives that the French experienced, merits careful analysis.

I. INTRODUCTION

The United States has long identified itself as a champion of human rights and the rule of law. The founding fathers, children of the enlightenment and believers in the rights of man, articulated a commitment to certain inalienable rights that would form the basis of a new politics. To early Americans, the new United States was to be a city on a hill, a beacon to others about how to respect individual freedom and dignity within the US polity. The expanding United States was to represent an empire of liberty. American exceptionalism, a sense of an exceptionally good people devising an ex-

* *David P. Forsythe* is University Professor and Charles J. Mach Distinguished Professor of Political Science at the University of Nebraska at Lincoln. The author would like to thank the following for comments on earlier drafts: Richard Bilder, Mel Gurtov, Ole Holsti, Patrice McMahon, Karen Mingst, and Michael Schecter.

ceptionally good polity based on personal rights, was born along with the republic and has been carefully nurtured since then.¹

With growing American power came a growing activism to supposedly promote human rights and democracy abroad, not just by the more passive and isolationist example of perfecting US society at home. This became, at least in theory, the US central mission in the world.² Thus, in the Spanish-American War, President William McKinley identified the United States with liberation against imperialism. President Woodrow Wilson justified US involvement in World War I in terms of advancing global democracy. President Franklin Delano Roosevelt presented World War II at home and abroad in terms of the defense of four freedoms, as the nations united for freedom against European fascism and Asian militarism.³ Cold War Presidents stressed the free world containing, if not rolling back, oppressive communism.

The semantics of both foreign and domestic policy have often stressed commitment to human freedom based on civil and political rights under law as the very definition of what it means to be *American*. This abstract, theoretical, or semantic identification has the status of a secular religion within the United States.

American exceptionalism, centered on civil and political rights, has always been more rhetoric than reality. For instance, many, if not most, of the founding fathers owned slaves and were slow to abandon slavery as an institution. The United States was one of the last nations in the Western Hemisphere to give up the practice, contesting, in particular, British attempts to first end the African slave trade and, eventually, slavery itself. Blatant and pervasive discrimination against African-Americans continued into the 1960s, especially in the South.

The American idea of Manifest Destiny in North America was built on the practice of ethnic cleansing, if not genocide, for Native Americans. Women were discriminated against politically until the 1920s and in other ways in the years before and the years that followed. Advocates for labor rights faced vigorous opposition and sometimes violent repression. There was much bias and discrimination against immigrants from various places, including southern Europe, Asia, and Central America, at different times and

-
1. See ANATOL LIEVEN, *AMERICA RIGHT OR WRONG: AN ANATOMY OF AMERICAN NATIONALISM* (2004); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE EDGE SWORD* (1998); CHARLES LOCKHART, *THE ROOTS OF AMERICAN EXCEPTIONALISM: HISTORY, INSTITUTIONS, AND CULTURE* (2003).
 2. TONY SMITH, *AMERICA'S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY* (1994). On the triumph of the activist version of American exceptionalism, and doubts about it, see MICHAEL H. HUNT, *IDEOLOGY AND US FOREIGN POLICY* (1987).
 3. The four freedoms stressed were freedom from want, freedom from fear, freedom of religion, and freedom of speech. Among many other analyses, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

in different ways. Catholics and Jews were often the targets of Protestant abuse, presaging discrimination against many Muslims in modern times. The Klu Klux Klan had a sizable and national membership until the 1920s. The Cold War brought McCarthyism and its major attacks on civil liberties and political tolerance. Gays are the current targets of much bias, especially from religious conservatives.

To some, to compare the US rhetoric on law and rights with the reality of various repressive and oppressive US policies suggests a hypocritical streak rarely matched by other countries. To others, given the real rights and freedoms that the government has supported, this comparison suggests a commitment to overcome blemishes in order to move towards an ideal that is rarely approximated by other countries.⁴

Moreover, especially in times of perceived insecurity, human rights usually suffer.⁵ If truth is the first casualty of war, violation of civil rights runs a close second. For instance, during the American Civil War, habeas corpus was suspended. During the First World War, Americans of German descent, German-speaking schools, and German language newspapers were victimized to varying degrees. Many who were not of German ancestry also suffered when they dissented from Wilson's policies.⁶ During the Second World War, the official repression of Japanese-Americans, some of them with relatives serving in the US military, is well documented. Additionally, the excesses of McCarthyism have already been noted. It is well known that there were also hard feelings toward those who dissented during the Vietnam war. The 2004 presidential race featuring John Kerry demonstrated that intolerance of dissent, even of failed policies, remains widespread.

The contrast between the rhetoric and reality of US nationalism, and the tendency of US nationalism to manifest a dark side during times of perceived insecurity, sets the framework for a discussion of US foreign policy after the terrorist attacks of 11 September 2001. This article focuses on US policy toward enemy detainees. The subject has been of great concern, particularly in the Islamic world and for human rights advocates in the United States, despite the fact that the public and much of the Congress remained largely acquiescent on the matter until the second half of 2005.

To what extent has the US rhetorical commitment to human rights under law impacted US policy toward supposed enemy prisoners in places such as Guantanamo Bay, Afghanistan, Iraq, secret detention centers, and various countries in which US-held prisoners have been rendered? To what extent

4. American exceptionalism is not entirely exceptional. See HUMAN RIGHTS AND COMPARATIVE FOREIGN POLICY (David P. Forsythe ed., 2000); LIEVEN, *supra* note 1.

5. See HUMAN RIGHTS AND DIVERSITY: AREA STUDIES REVISITED 25 (David P. Forsythe & Patrice C. McMahon eds., 2003).

6. The repressive spirit of those Wilsonian times is captured well by John Barry. JOHN M. BARRY, THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY 205–07 (2004).

have US authorities respected the 1949 Geneva Conventions for Victims of War (Geneva Conventions)⁷ and the UN Convention Against Torture and Degrading Treatment (UN Convention Against Torture)?⁸ On this subject, do we find anything but the usual gap between rhetoric and reality in US policy? Do we find anything but the usual assault on human rights during times of national insecurity? Given, as will be shown, that *intentional* prisoner abuse occurred, can and should the Bush Administration sustain this policy in the face of considerable criticism?

II. THE RELEVANCE OF HISTORY: THE FRENCH CASE

Many in the United States, including those in high positions in government, view the world as having entered a new age after 11 September 2001—the age of terrorism. The Al Qaida terrorist attacks supposedly ushered in a new, all-consuming struggle between those civilized and those otherwise. However, just as the contemporary US discourse about imposing democracy and human rights by force are reminiscent of past rationales for European imperialism,⁹ US counterterrorism policies are particularly reminiscent of French policies in Algeria.

Ernest Renan wrote that “historical error [is] an essential factor in the formation of a nation.”¹⁰ Even more to the point is Eric Hobsbawm’s paraphrasing: “Nationalism requires too much belief in what is patently not so.”¹¹ This point is relevant not just to those US ultra-nationalists who sincerely believe in American exceptionalism. It is also relevant to the fact that most

-
7. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956) [hereinafter Geneva Convention I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956) [hereinafter Geneva Convention II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956) [hereinafter Geneva Convention III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956) [hereinafter Geneva Convention IV].
 8. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1985) (*entered into force* 26 June 1987), *reprinted* in 23 I.L.M. 1027 (1984), *substantive changes noted* in 24 I.L.M. 535 (1985).
 9. See RASHID KHALDI, *RESURRECTING EMPIRE* (2004); NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2002).
 10. See E. J. HOBBSBAWN, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* 12 (Cambridge Univ. Press 1990).
 11. *Id.*

Americans have forgotten, if they ever knew, the pertinent history of the nationalism of others when fighting terrorism. On the subject of enemy detainees, it is French history in particular that merits brief address, specifically French torture during the Algerian war. United States policy makers and leading media personalities have yet to draw the connections between French colonial history in Algeria and the current US "war on terrorism." However, the Bush policy is very similar to the French policy from 1954 to 1962, for similar reasons, and with similar results, albeit not identical.

The relevant historians know that the French-Algerian war was a war of terror and torture, with atrocities committed on both sides. As for the French struggling to hold their colony and rationalizing their role under the banner of a global civilizing mission, they did what they thought necessary to defend noble national interest. For General Paul Aussaresses, his role was clear and he had no regrets.

What I did in Algeria was undertaken for my country in good faith, even though I didn't enjoy it. One must never regret anything accomplished in the line of duty one believes in. . . . [O]nce a county demands that its army fight an enemy who is using terror . . . it becomes impossible for that army to avoid using extreme measures.

Just think for a moment that you are personally opposed to torture as a matter of principle and that you have arrested a suspect who is clearly involved in preparing a violent attack. The suspect refuses to talk. You choose not to insist. Then the attack takes place and it's extremely bloody. What explanation will you give to the victim's parents, the parents of a child, for instance, whose body was torn to pieces by the bomb, to justify the fact that you didn't use every method available to force the suspect into talking.¹²

Some important results of this position are poignantly captured by Jean Paul Sartre:

But now when we raise our heads and look into the mirror we see an unfamiliar and hideous reflection: ourselves. Appalled, the French are discovering this terrible truth: that if nothing can protect a nation against itself, neither its traditions nor its loyalties nor its laws . . . then its behaviour is not more than a matter of opportunity and occasion. . . . Happy are those who died without ever having to ask themselves: "If they tear out my fingernails, will I talk?" But even happier are others, barely out of their childhood, who have not had to ask themselves that *other* question: "If my friends, fellow soldiers, and leaders tear out an enemy's fingernails in my presence, what will I do?"

. . .

12. PAUL AUSSARESSES, *THE BATTLE OF THE CASBAH: TERRORISM AND COUNTER-TERRORISM IN ALGERIA 1955–1957*, at xiii, 17 (2002).

Suddenly, stupor turns to despair: if patriotism has to precipitate us into dishonour, if there is no precipice of inhumanity over which nations and men will not throw themselves, then, why, in fact, do we go to so much trouble to become, or to remain, men? Inhumanity is what we really want. But if this really is the truth, if we must either terrorise or die ourselves by terror, why do we go to such lengths to live and to be patriots?¹³

Accordingly, the democratic French, who had greatly contributed to the theory and practice of human rights, committed torture. And because the French had tortured, they could not put their enemies on trial; instead, they summarily executed them. Their efforts to sweep these atrocities under the rug for many years led to the loss of their self-respect, as well as the respect of many others, starting with the Arab-Islamic world. Torture may have helped the French win the battle of Algiers, but their policy of abuse led to many negatives, including increased domestic criticism and loss of reputation in the world; meanwhile their enemies failed to lessen their struggle. The Bush policy toward enemy detainees replicates much of this French experience.

III. THE REALITY OF THE BUSH POLICY

There are two schools of thought about the usefulness of torture and mistreatment of enemy prisoners. It is impossible for an outside analyst to know which is correct. The first view holds that abuse can lead to valuable information, citing such evidence as the French in the battle of Algiers. The second view holds that abuse is unreliable and counterproductive, inferior to establishing the rapport necessary between interrogator and prisoner to evoke valuable information over time. The first view has many adherents in the Central Intelligence Agency (CIA) and the military Special-Operations units, among other circles. The second view is officially supported by the uniformed military and their military manuals. If the second view is correct, then there would be almost no need to resort to the first, even if it proves effective on occasion.¹⁴

From the beginning of the US war on terrorism, President Bush and his closest advisors (and their lawyers), Vice President Cheney, Secretary of Defense Rumsfeld, and Legal Counsel Gonzales, opted for abusive interrogation over humane interrogation. They were backstopped by lawyers primarily from the Justice Department. State Department officials and those

13. Jean-Paul Satre, *Introduction to HENRI ALLEG, THE QUESTION* 12, 13–14 (1958).

14. Only when a prisoner, as a matter of certainty, possesses actionable intelligence about an impending major attack that threatens the life of a democratic nation should abuse be justified. See MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004). Even then, for Ignatieff, certain controls would need to be in place.

from the National Security Council (NSC), including even NSC Advisor Condoleezza Rice, were apparently shunted aside early in deliberations. So were many uniformed lawyers in the Department of Defense. All of the lawyers centrally involved were civilian political appointees.¹⁵ These lawyers may have engaged in the unethical practice of advising their clients about how to violate the law.¹⁶

The Bush Administration, declaring a metaphorical “war” and implying that the usual legal restraints and checks and balances did not apply, abused many enemy detainees. This was presaged by a statement made by Vice President Cheney on 16 September 2001: “We also have to work, though, sort of the dark side, if you wish. We’ve got to spend time in the shadows . . . so it’s going to be vital for us to use any means at our disposal, basically, to achieve our objectives.”¹⁷ Cofer Black, formerly of the CIA, told Congress: “After 9/11, the gloves came off.”¹⁸ Like General Aussaresses, this inner circle deemed coercive interrogation necessary to national interest. To them, coercive interrogation served generally to prevent another attack on the homeland and more specifically to obtain actionable intelligence in Afghanistan and Iraq. Partly driving the process was a righteous indignation that the virtuous United States had been attacked by immoral terrorists fighting a total war involving attacks on innocent civilians.¹⁹

A. Vitiating Legal Restraint

The first step in the process was to vitiate law that might interfere with coercive interrogation, as well as to give legal cover to US officials engaged in abuse.²⁰ This involved first the assertion that international humanitarian law (IHL), principally the Geneva Conventions, did not pertain to anyone held at the US naval base at Guantanamo Bay, Cuba (Gitmo), which the

-
15. See Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, 24 Oct. 2005; John Barry et al., *The Roots of Torture*, NEWSWEEK, 24 May 2004, at 26.
 16. This was suggested diplomatically in establishment circles. Richard B. Bilder & Dettlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 691 (2004).
 17. Interview with Vice President Dick Cheney (NBC *Meet the Press* television broadcast, 16 Sept. 2001), *quoted in* HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 9 (2005), available at <http://www.hrw.org/reports/2005/us0405/>.
 18. *Hearing before the H. and S. Intelligence Comm. on Pre-9/11 Intelligence Failures*, 107th Cong. (2002) (testimony of Cofer Black), *quoted in* HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES, *supra* note 17, at 9.
 19. JAMES MANN, RISE OF THE VULCANS: THE HISTORY OF BUSH’S WAR CABINET 297 (2004).
 20. See THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS]; MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004).

United States leased from Cuba in perpetuity. The choice of this location was a strategic one in the hopes that US courts would not assert jurisdiction over events there.²¹ The Administration sought to deny the legal protections of IHL even to those fighting for the Taliban government of Afghanistan, as well as others detained by reason of the multifaceted armed conflict in that country.²² This US view clearly contradicts the plain meaning of the Geneva Conventions, which apply to all situations of armed conflict. The widespread nonrecognition of the Taliban government makes no difference. Particularly the Third and Fourth Geneva Conventions applied in whole or in part when the US attacks commenced. The Third Geneva Convention²³ pertains to combatants, and the Fourth Geneva Convention²⁴ applies to civilians. The issue is not simply who is a Prisoner of War (POW) under the Third Geneva Convention. Even those who do not qualify as a POW or privileged combatant, but who are detained in connection to armed conflict, retain various degrees of protected status under IHL.²⁵ Even illegal or irregular combatants merit certain minimal protections. The Bush Administration also refused to allow an independent court to make determinations about such legal status, as called for by the Third Geneva Convention.²⁶

Secondly, the Bush team sought to redefine provisions of the UN Convention Against Torture so as to render that treaty, which is legally applicable in both peace and war, meaningless. The prohibition on intentional infliction of severe pain, whether physical or mental, for example, was said to mean that short of something like organ failure, torture did not exist. Or, as a second example, the same wording was held to mean that if an interrogator did not intend to cause severe pain, the existence of such pain would not block the abuse.²⁷ While these erroneous positions were eventually rescinded when made public and criticized, the original objective was patently clear. The official attitude toward this treaty against torture was that it had no intrinsic meaning; rather, it meant whatever the government said.²⁸

21. For a short and readable overview, see Jordan Paust, *The Common Plan to Violate the Geneva Conventions*, JURIST, 25 May 2004, available at <http://jurist.law.pitt.edu/forum/paust2.php>.

22. It is reasonable to characterize Afghanistan during 2001 and 2002 as manifesting an internal armed conflict between the Taliban government and the Northern Alliance, over which was imposed an international armed conflict between the United States and the Taliban government.

23. Geneva Convention III, *supra* note 7.

24. Geneva Convention IV, *supra* note 7.

25. For a short and readable review of this issue, plus notation of its importance, see Adam Roberts, *The Prisoner Question: Keeping the Unlawful Combatants Out of Legal Limbo*, WASH. POST OUTLOOK, 3 Feb. 2002, at B1.

26. Some of those detained at Guantanamo Bay were of various nationalities and seized in Bosnia, Macedonia, Pakistan, or some other place outside of Afghanistan; and their legal status was clearly different, especially from Afghanistan nationals.

27. For the relevant documents, see THE TORTURE PAPERS, *supra* note 20.

28. There is no clear scientific or legal distinction between torture and lesser forms of mistreatment. Case law over time might clarify the difference, per the European

Thirdly, memos were written arguing that in times of war, the President had unlimited authority to protect the nation, and that even national laws did not necessarily always apply.²⁹

Fourthly, it was decided to engage in the practice of forced disappearances. That is, US authorities held detainees in secret places but did not acknowledge detaining them, thus preventing, in a practical sense, any law applying to them. According to the *Washington Post*, some of these ghost detainees were held in eight locations abroad, with two locations said to be in Eastern Europe.³⁰ The Bush team displayed exceptional control over the information pertaining to such persons.³¹

Fifthly, certain persons were rendered, or deported or transferred, without legal process to foreign jurisdictions such as Egypt, known for harsh interrogation practices, with the understanding that assurances had been obtained regarding prohibition of improper interrogation.³² Apparently, the Bush Administration accelerated, rather than initiated, this policy, which prevented US courts from exercising any jurisdiction under US law.³³

Various changes or additions to some of these early positions occurred over time. In Iraq, after the invasion of March 2003, the Bush Administration agreed that an international armed conflict and occupation existed, to which IHL applied.³⁴

Still, consistent with the view permeating the Bush Administration that international law and organization had no intrinsic value and that it functioned often to restrain a virtuous United States,³⁵ the Bush Administration made a determined effort to minimize obligations under IHL, international

Court of Human Rights or the Israeli Supreme Court. But given that the international legal definition of *torture* hinges on the intentional infliction of *intense* pain, physical or mental, the dividing line is subjective.

29. THE TORTURE PAPERS, *supra* note 20.

30. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, 2 Nov. 2005, at A1.

31. Douglas Jehl, *White House Has Tightly Restricted Oversight of C.I.A. Detentions*, *Officials Say*, N.Y. TIMES, 6 Apr. 2005, at A21.

32. For a particularly good analysis of US ties with Uzbekistan on this matter, with confirmation from British diplomatic circles, see Don Van Natta, Jr., *U.S. Recruits a Rough Ally to be a Jailer*, N.Y. TIMES, 1 May 2005, at 1. Also, an Australian security official confirmed that another person was picked up in Pakistan, transferred to Egypt, then sent to Gitmo. Raymond Bonner, *World Briefing, Australia; Security Chief Says Detainee was in Egypt*, N.Y. TIMES, 16 Feb. 2005, at A8. US officials had previously denied all this. See also Jane Mayer, *Outsourcing Torture*, NEW YORKER, 14 Feb. 2005, at 106.

33. Michael Scheuer, *A Fine Rendition*, N.Y. TIMES, 11 Mar. 2005, at A23. The author is a former CIA official.

34. The US and UK statements accepting that IHL applied to Iraq after their invasion is reviewed with citations by Scheffer. David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003).

35. MANN, *supra* note 19; see also ROBERT KAGAN, *OF PARADISE AND POWER: AMERICAN AND EUROPE IN THE NEW WORLD ORDER* (2003); JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (2004). The author, a former State Department lawyer, sees the US as now failing to fashion foreign policy with respect for international law.

human rights law, and US law. The Administration put particular emphasis on the unrestricted exercise of Executive Branch power. For many Bush officials (excepting parts of the State Department and Judge Advocate General (JAG) division of the Pentagon), reference to law was in order to construct a certain image and provide lower officials a certain legal defense,³⁶ while getting on with the violation of international standards protecting human dignity.

B. Instituting Coercive Interrogation

Rumsfeld deemed the initial flow of information from Gitmo under Brigadier General Rick Baccus and Major General Michael Dunleavy to be insufficient. He therefore dispatched Major General Geoffrey Miller to make changes. Miller implemented a harsh regime at Gitmo, ensuring that military police units were tough on prisoners, like military intelligence units.³⁷ Rumsfeld issued, modified, and reissued a list of different categories of interrogation techniques pertaining to US military personnel.³⁸ The CIA and the Federal Bureau of Investigation (FBI) no doubt issued other instructions. For the United States, the primary purpose of Gitmo was first to aide in intelligence gathering and also to function as a holding facility. Initially the question of legal prosecutions remained marginal to Washington, that is, until US courts entered the fray.

Regardless of Rumsfeld's specific intentions (probably highly coercive interrogation for a limited group of prisoners with supposedly high intelligence value), it is clear that from 2002 to 2004, a number of prisoners were abused at Gitmo. This we know from an International Committee of the Red Cross (ICRC) report, probably leaked by dissidents from within the US Executive.³⁹ There were also leaked FBI memos obtained by nongovernmental organizations (NGOs) under the US Freedom of Information Act, as well as books written by a US translator and a chaplain, who recounted their respective experiences at Gitmo.⁴⁰ Eventually, released prisoners themselves also made claims of abuse.⁴¹

36. See Elizabeth Holtzman, *Torture and Accountability: Prosecuting US Misconduct in Iraq*, NATION, 28 June 2005, at 20.

37. Initially, under Baccus and Dunleavy, particularly, the military police at Gitmo operated according to the rule book of the Geneva Conventions. See Interview with Rick Baccus, *The Torture Question*, Frontline, PBS, available at <http://www.pbs.org/wgby/pages/frontline/torture/interviews>.

38. THE TORTURE PAPERS, *supra* note 20.

39. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, 30 Nov. 2004, at A1.

40. This essay has more on the ICRC later. The FBI memos were obtained and published by the ACLU on its website. For the interrogator's book, see ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE* (2005). For the chaplain's book, see JAMES YEE, *FOR GOD AND COUNTRY: FAITH AND PATRIOTISM UNDER FIRE* (2005).

41. AMNESTY INTERNATIONAL, *UNITED STATES OF AMERICA: HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE "WAR ON TERROR"* (2004) [hereinafter AI, HUMAN DIGNITY DENIED]. For another

Some prisoners were sexually and religiously taunted and humiliated. They were restrained in painful positions. They were subjected to extremes of heat and cold. They were subjected to loud music or other noises, as well as to flashing lights. They were kept in isolation for long periods. They were force-fed liquids, then made to urinate on themselves. They were also made to defecate on themselves. They were intimidated by military police dogs. In short, they were given the "torture lite" treatment, similar to what the Israelis had practiced against Palestinian detainees for considerable time in the Middle East and what the British had used for a time against members of the Irish Provisional Authority in Northern Ireland.⁴² The interrogation process was such that both FBI agents and CIA agents sought to distance themselves from it, lest they be held legally responsible. The CIA might have been doing something similar, by way of similar interrogation in other places, but the agency did not want to be tagged for the abuses at Gitmo.⁴³

In addition, some prisoners were physically beaten and otherwise abused by US Military Police in actions that did not seem to be approved by Military Intelligence or higher authorities.⁴⁴

In spring 2003, the US forces invading Iraq found themselves with large numbers of detainees. In addition, they were faced with a persistent and violent insurgency against their presence. The poor management of prisoner affairs represented only one part of a bungled occupation.⁴⁵ In that situation, General Miller was transferred from Gitmo to Iraq in August to systematize and improve the quest for intelligence. One US report accurately noted that the US treatment of Iraqi prisoners migrated from Gitmo.⁴⁶ Guards concealed prisoners during ICRC visits and kept them in darkened isolation in an effort to break them into giving more information. As usual, troops also abused prisoners in the field at the point of capture, especially the US Special Op-

summary, see Human Rights Watch, *Timeline of Detainee Abuse Allegations and Responses*, 7 May 2004, available at www.hrw.org/english/docs/2004/05/07/usint8556.htm. See also Bob Herbert, *Stories From The Inside*, N.Y. TIMES, 7 Feb. 2005, at A21.

42. See Josephy Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAG., 12 June 2005, at 36; see also IGNATIEFF, *supra* note 14.

43. Douglas Jehl et al., *C.I.A. Is Seen as Seeking New Role on Detainees*, N.Y. TIMES, 16 Feb. 2005, at A16. Porter Goss, the new head of the Agency, told Congress that he could not confirm that all past CIA practices had been in keeping with federal laws that prohibited torture. Douglas Jehl, *Questions Left By C.I.A. Chief on Torture Use*, N.Y. TIMES, 18 Mar. 2005, at A1.

44. SAAR & NOVAK, *supra* note 40. His account on this point was later confirmed by other sources.

45. James Fallows, *Blind Into Baghdad*, ATLANTIC MON., Jan.-Feb. 2004, at 53; Michael R. Gordon, *How the Postwar Situation in Iraq Went Awry "Catastrophic Success,"* INT'L HERALD TRIB., 19 Oct. 2004. See also LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* (2005).

46. See The Schlesinger Report, Final Report of the Independent Panel to Review DoD Detention Operations (Aug. 2004), *reprinted in* THE TORTURE PAPERS, *supra* note 20, at 908. An internal military investigation of Miller at Gitmo recommended a reprimand, but this did not occur. David S. Cloud, *Guantanamo Reprimand was Sought, an Aide Says*, N.Y. TIMES, 13 July 2005, at A16.

erations Forces trained to act outside the bounds of conventional warfare. This abuse was such that the CIA distanced itself from it.⁴⁷ The US Central Command for Iraq, headed by Lt. General Ricardo Sanchez, lacked proper staff and organization, precipitating the conditions that led to egregious abuses of Iraqi detainees. This abuse became well-known in 2004 with the release of unauthorized photographs of the humiliating treatment. Lt. General Sanchez also explicitly authorized certain abusive techniques, as well as pressing subordinates for more actionable intelligence from prisoners.⁴⁸ Although some of the prisoner abuse in Iraq proved fatal, there is no evidence to suggest that this occurred in Gitmo.

In Afghanistan from 2001, there were persistent reports of prisoner abuse.⁴⁹ As in Iraq, some of the abuse in Afghanistan proved fatal. Eventually, the US military reported investigations into some thirty deaths of prisoners who died while in US custody in both Iraq and Afghanistan. Released prisoners articulated the usual complaints, namely, about the same conditions of confinement and other techniques used at Gitmo.⁵⁰ Various press reports confirmed the accuracy of these and other charges.⁵¹

Most of this coercive interrogation constituted a violation of IHL and of the UN Convention Against Torture, which both prohibit degrading treatment, or torture lite, as well as "torture heavy." It violated the Uniform Code of Military Justice, which is based on IHL. Additionally, the coercive interrogation probably violated various tenets of US constitutional law, particularly the 8th Amendment prohibitions of cruel and unusual punishment, although US courts have yet to so rule.⁵²

47. Douglas Jehl, *The Reach of War: Interrogations; C.I.A Order On Detainees Shows Its Role Was Curbed*, N.Y. TIMES, 14 Dec. 2004, at A15.

48. Reuters, *Harsh Tactics Were Allowed, General Told Jailers in Iraq*, N.Y. TIMES, 30 May 2005, at A8.

49. A UN rapporteur on Afghanistan for the Human Rights Commission, M. Cherif Bassiouni, who teaches at DePaul University in the United States, compiled a damaging report on prisoner treatment in Afghanistan, whereupon his position was not renewed by the Commission. Warren Hoge, *Lawyer Who Told of US Abuses at Afghan Bases Loses U.N. Post*, N.Y. TIMES, 30 Apr. 2005, at A7.

50. See, e.g., Human Rights Watch, *Afghanistan*, available at <http://www.hrw.org/doc?t=asia&c=afghan>.

51. On ghost detainees in Afghanistan, see Eric Schmitt & Tim Golden, *Details Emerge on Terror Suspects' Afghan Jailbreak*, INT'L HERALD TRIB., 30 Apr. 2005, at A6. On CIA use of cold cells and water boarding, see Human Rights First, *CIA Sources Outline Interrogations Methods*, U.S. L. & SEC. DIG., 2 Dec. 2005, available at http://www.humanrightsfirst.org/us_law/digest/usls_digest74_120205.htm.

52. It is relevant to recall that given the tenor of the times, US citizens seen as lending support to "the enemy" were treated badly when detained. James Yee, an Islamic chaplain at Gitmo, was given harsh detention conditions, including prolonged isolation, before all charges were dropped. John Lindh, captured while fighting for the Taliban in Afghanistan, was treated illegally and coercively before legal proceedings and plea bargaining led to his twenty-year jail term. For receiving a shorter sentence than the law allowed, he dropped his charges relating to mistreatment.

C. Covering Rhetoric, Reactive Policies

Early on, President Bush sought to provide reassuring rhetoric about treatment of enemy detainees, but this was patently meaningless. He assured that such prisoners would be treated humanely, in keeping with the principles of the Geneva Conventions, but only in so far as military necessity permitted.⁵³ This statement suggests that humane treatment could be overridden on the basis of what US leaders might say to be military necessity.⁵⁴

Other Administration statements over time reiterated the theme of humane treatment that ruled out torture. But aside from withdrawing the more extreme assertions about the definition of torture,⁵⁵ the Administration refused to articulate exactly what constituted torture or to prohibit torture lite.⁵⁶ Bush officials simply refused to address the fact that international law also prohibited torture lite in the form of degrading treatment. At times, Administration spokespersons simply avoided the truth, as when the Pentagon denied abuse at Gitmo and instead claimed that detainees were treated humanely and properly, even when reliable ICRC and other overwhelming evidence clearly indicated otherwise.⁵⁷ When in 2005 it became clear that abuse was part of the interrogation of the presumed twentieth hijacker, Mohamed al-Kahtani of Saudi Arabia, Rumsfeld did not deny the nature of the interrogation process, but rather noted that the interrogation was closely monitored by specialists.⁵⁸ Thus, the argument maintained that the process of coercive interrogation existed but was limited and controlled. Because it was presumably torture lite instead of torture heavy, it was presumed to be legitimate. According to the rhetoric, the interrogation was also presumably

53. For the pertinent memos, see *THE TORTURE PAPERS*, *supra* note 20. US policy was similar to Israeli policy in occupied territory, at least up to 1999: rejection of the formal application of IHL and a promise to treat humanely, but actual abuse of prisoners.

54. *AI, HUMAN DIGNITY DENIED*, *supra* note 41.

55. Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, *N.Y. TIMES*, 1 Jan. 2005, at A1.

56. Various sorts of semantic games by governmental spokespersons tried to convey that "sleep management" and "stress positions" did not add up to abuse, humiliating treatment, degrading treatment, ill-treatment, or, in combination, torture. See Adam Hochschild, *Op-Ed, What's in a Word? Torture*, *N.Y. TIMES*, 23 May 2004, at 11 §4.

57. Josh White & John Mintz, *Red Cross Cites "Inhumane" Treatment at Guantanamo*, *WASH. POST*, 1 Dec. 2004, at A10. See also Anthony Lewis, *Guantanamo's Long Shadow*, *N.Y. TIMES*, 21 June 2005, at A23 (reacting to statement by Vice President Cheney). See also the statement by Secretary of Defense Rumsfeld, denying that any abuse at Abu Ghraib was related to interrogation. Eric Schmitt, *The Reach of War: Prisoners/ Rumsfeld Mischaracterizes Findings of 2 Studies on U.S. Abuse at Iraqi Interrogations*, *N.Y. TIMES*, 28 Aug. 2004, at A6.

58. David Johnston & Thom Shanker, *Pentagon Approved Intense Interrogation Techniques for Sept. 11 Suspect at Guantanamo*, *N.Y. TIMES*, 21 May 2004, at A10; Maxim Knaizkov, *Pentagon Gives no Excuses for Suspect Treatment: Senators Aghast*, *AGENCE FRANCE PRESSE*, June 2005.

legitimate because it yielded life-saving information. Such arguments were more about political legitimacy than legality.

Still further, the process of disappearing persons or turning them into ghost detainees continued, as well as the policy of rendering persons to interrogators in places such as Uzbekistan and Egypt, *inter alia*. It should be noted that during the armed conflict and occupation of Iraq, the transfer of detainees out of the area is a clear violation of IHL. Further, one can understand the nature of interrogation in places such as Egypt by looking at the State Department's annual human rights reports, which repeatedly find that torture and other abuse of prisoners is systematic in those states.⁵⁹ There would be no point in having such policies if prisoners were to be treated humanely and in conformity with legal obligations. A legal and fully humane approach would not tolerate disappearance or rendition. It is in the context of disappearances that there have been reports of water boarding, of making a prisoner think that he will drown for his refusal to say what interrogators want. Water boarding certainly qualifies as torture heavy.⁶⁰

At Gitmo and in Afghanistan and Iraq, the US military brought criminal proceedings against a variety of individuals. Most of those charged ranked toward the bottom of the military hierarchy. Some, including some high ranking officers, were administratively sanctioned. One Brigadier General in the Reserves, Janis Karpinski, nominally in charge of the infamous Abu Ghraib prison in Iraq, was demoted.⁶¹ Also sanctioned was Colonel Thomas Pappas, despite his statement that he was pressured by superiors to get tougher with detainees in Iraq.⁶² When the policy of coercive interrogation was applied to a broad range of individuals or resulted in unfavorable publicity, the United States sometimes brought charges or levied sanctions against its own military personnel. But beyond Karpinsky and Pappas, no high officers were held accountable for organizing and supervising the process. The role and fate of private interrogators under contract, or agents of the CIA and FBI, is unknown.

59. See US Department of State, County Reports on Human Rights Practices, available at <http://www.state.gov/g/drl/hr/c1470.htm>.

60. A German national was seized by the US in the Balkans, then transferred to Afghanistan, where he was abused. It was a case of mistaken identity, and NSC Advisor Rice intervened after some months to get him released, with involvement by the German government. "Ghost detainees" could be "rendered" almost anywhere in this secret, unaccountable process. Apparently, the prisoner was bound in painful positions, beaten, and injected with drugs. David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. TIMES, 23 Apr. 2005, at A3.

61. She claims in her book that she was used as a scapegoat, having neither the authority nor the resources to have been responsible for abuses at Abu Ghraib. JANIS L. KARPINSKI, *ONE WOMAN'S ARMY: THE COMMANDING GENERAL OF ABU GHRAIB TELLS HER STORY* (2005).

62. United Press International (UPI), *General at Odds over Abuse at Prisons*, WASH. TIMES, 26 May 2004 (reporting on Pappas comments to Major General Taguba). See also Douglas Jehl, *Officers Say U.S. Colonel at Abu Ghraib Prison Felt Intense Pressure to Get Inmates to Talk*, N.Y. TIMES, 19 May 2004, at A21.

At the same time, the Administration ensured that the spotlight of inquiry did not proceed up the chain of command. After the photos of the abuses at Abu Gharib surfaced, several investigations were commissioned, mostly about Iraq rather than Afghanistan or Gitmo, and always by the Office of the Secretary of Defense. The military inquiries were carefully structured to fragment foci and to avoid review of the Office of the Secretary of Defense and, of course, of the White House. The one independent panel, made up of former members of the national security establishment such as James Schlesinger, former Secretary of Defense, found personal and institutional responsibility for prisoner abuse at high levels; but it refused to name those responsible.⁶³ The follow-up report by Vice Admiral Albert Church III remained classified. A released summary cleared all high ranking military officials in Iraq of any responsibility for abuse of prisoners.⁶⁴ Members of the Schlesinger panel did not vigorously protest.

No one beyond General Karpinski and Colonel Pappas was held responsible for sins of omission or neglect regarding Iraq. No high ranking officer was held responsible for the conscious hiding of prisoners or keeping them in inhumane conditions. General Miller, a major player regarding both Gitmo and prisons in Iraq, was cleared of any responsibility for events by Admiral Church. Lt. General Ricardo Sanchez, head of all military operations in Iraq, who under the doctrine of command responsibility should have known about the unauthorized brutality and humiliation, and who at one point had authorized harsh interrogation, including the use of dogs to intimidate, was said to be under consideration for further promotion.⁶⁵

President Bush advanced others who had been key in developing US policy toward enemy detainees. He nominated Gonzales for Attorney General. Jay B. Bybee, a Justice Department lawyer who had written some of the early, permissive memos, was nominated to be a federal judge for the important Ninth Circuit Court of Appeals. William J. Haynes II, a Pentagon lawyer who had approved some of the early, permissive memos, was nominated to the Fourth Circuit Court of Appeals. The President also refused to accept Rumsfeld's letters of resignation.

63. See, e.g., *THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ* (Steven Strasser ed., 2004).

64. The Church report was widely seen as a whitewash of the issues. Among many typical press reports, see Tom Squitieri, *Pentagon Report on Prisoner Abuse Met with Skepticism: Probe to Go On*, USA TODAY, 11 Mar. 2005.

65. See Holtzman, *supra* note 36; R. Jeffery Smith, *General is Said to Have Urged Use of Dogs*, WASH. POST, 26 May 2004, at A1.

IV. DOMESTIC REACTION

By and large, US society and the Republican majority in both houses of Congress did not want to delve deeply into the Bush policy toward enemy detainees during the period from 2002 to 2004. As Sartre noted in the 1950s, it is disturbing to face the question of what to do when co-nationals are in favor of dehumanizing policies, such as pulling out fingernails.⁶⁶ It is painful to directly confront how much abuse of individuals is justified by attempts to protect the nation.

No sizable grassroots public movement arose in protest. But this is not surprising. Even in the face of genocide, the US public has not roused itself to demand a proper response from its foreign policy officials.⁶⁷ After all, the country, including civilians, had been attacked. Moreover, there is a dark side to a free society: the public is preoccupied with individual things, including family, jobs, schools, healthcare, and pensions, among others.⁶⁸ Michael Ignatieff believes that the middle class in a democracy will always elevate defense of the nation over civil liberties.⁶⁹

Congressional Republicans, caught up in the nationalistic reaction to 11 September 2001, were also reluctant to provide critical oversight of a Republican President. A few hearings were held, but military officials dissembled, the tough questions were not asked, and the issues were swept under the congressional rug.⁷⁰ Gonzales was confirmed as Attorney General, despite his efforts to undermine the applicability of the Geneva Conventions to those seized in Afghanistan in the context of armed conflict. Because of the damage he had done to IHL because of this incorrect position, his confirmation in the Senate was opposed by a number of high ranking military officials. He stated in his confirmation hearings that US law against torture did not cover US officials when interrogating foreign detainees outside the United States.⁷¹ Bybee was confirmed to sit on the Ninth Circuit appellate bench.

As time passed and American support for the war in Iraq waned and as the President's approval ratings on several issues fell, some members of Congress, including a few Republicans, began to speak out about closing

66. Sartre, *supra* note 13.

67. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002).

68. See MICHAEL MANDELBAUM, *THE IDEAS THAT CONQUERED THE WORLD: PEACE, DEMOCRACY, AND FREE MARKETS IN THE TWENTY-FIRST CENTURY* 93 (2002). A public opinion poll conducted at the University of Maryland in the summer of 2004 found that the US public opposed almost all forms of torture, even faced with possible terrorism. PIPA/KNOWLEDGE NETWORKS POLL, *AMERICANS ON DETENTION, TORTURE, AND THE WAR ON TERRORISM* (22 July 2004), available at http://www.pipa.org/OnlineReports/Terrorism/Torture_Jul04/Torture_Jul04_rpt.pdf.

69. IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR*, *supra* note 14.

70. John Tierney, *Hot Seat Grows Lukewarm Under Capital's Fog of War*, N.Y. TIMES, 20 May 2004, at A14.

71. *Executive Nomination: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005).

Gitmo and about other prisoner issues. There was thus some unease about detention policies among some Republicans as well as Democrats. Particularly in the Senate, led by Republican Senators John McCain, Lindsay Graham, and John Warner, all of whom were interested in notions of American and military honor, as well as international standards, there was finally open defiance of Bush's policies on the question.

In the context of increased publicity,⁷² the Senate voted ninety to nine to oppose any interrogation procedures that were not in keeping with those approved in US military manuals.⁷³ This language also passed in the Republican-controlled House by a comfortable margin.⁷⁴ After the Bush Administration failed to weaken the measure,⁷⁵ the President signed the legislation but issued a signing statement that raised question about whether he would follow the plain meaning of the law in all situations.⁷⁶ That is, while sponsors such as Senator McCain considered the legislation to require a blanket prohibition on abusive interrogation, the President's signing statement suggested exceptions could exist under different authority.

Despite the appearance of consensus in support of humane interrogation, the issue was still delicate. When Senator Richard Durbin (D—IL) publicly compared US treatment of enemy detainees to Nazi practices, he faced such a vigorous attack by the Administration and congressional Republicans that he was forced to apologize.⁷⁷

Some members of Congress visited Gitmo, as if a short, scheduled visit would prove anything about the nature and extent of abusive interrogation there. Moreover, one interpreter claimed that some show interrogations had been staged in the past when members of Congress had visited Gitmo.⁷⁸

The one element of the national media that did the most to maintain a critical focus on the issue was *The New York Times*, which ran several

72. For a cover story on torture with a picture of John McCain, see *NEWSWEEK*, 21 Nov. 2005.

73. Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, *N.Y. TIMES*, 5 Oct. 2005, at A1.

74. The House vote was 308–122. See Press Release, Human Rights First, House Votes Overwhelmingly in Favor of McCain Amendment: Motion to Instruct Conferees Passes with 308 Votes (14 Dec. 2005), available at http://www.humanrightsfirst.org/media/2005_alerts/etn_1215_vote_mccain.htm.

75. Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, *N.Y. TIMES*, 25 Oct. 2005, at A17.

76. See President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," (30 Dec. 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/>. For an analysis of the meaning of Bush's technical signing statement, see Charlie Savage, *Bush Could Bypass New Torture Ban*, *BOSTON GLOBE*, 4 Jan. 2006.

77. Sheryl Gay Stolberg, *Leading Democrat Apologizes for Prisoner Abuse Remark*, *N.Y. TIMES*, 22 June 2005, at A14.

78. SAAR & NOVAK, *supra* note 40.

prominent stories and editorials challenging Bush policies. But US detainee policies were covered by a large segment of the American communications media, as any quick search of the Internet record would show.

Liberal interest groups, such as the ACLU, played important roles by using the Freedom of Information Act to get important documents into the public domain, such as the FBI memos expressing concern about harsh military interrogation at Gitmo.⁷⁹ Human Rights First, formerly the Lawyers Committee for Human Rights, pursued the subject of prisoner abuse with much determination. It also helped bring a lawsuit against Secretary of Defense Rumsfeld on behalf of certain prisoners.⁸⁰ It was also important that certain JAG lawyers, concerned about disrespect for IHL, which after all is supposed to protect US military personnel when detained by others, expressed their concerns to Scott Horton, head of the New York City Bar Association's Committee on International Human Rights, who then directed several trenchant studies.⁸¹ Horton also engaged in public commentary in important media outlets such as the *Jim Lehrer News Hour* on the Public Broadcasting Service (PBS).⁸²

The problem for critics, especially in the Democratic Party, was that they did not control the congressional oversight and budgetary process. Moreover, in elections, particularly the 2004 presidential campaign, they did not want to appear soft on national security issues, nor did they want to articulate an alternative policy to the Bush Administration's policy. In that presidential race, for instance, the topic of treatment of enemy detainees was not raised by the Democrats in any central way, and certainly not by their presidential candidate, John Kerry.

In this political context, US courts slowly and gingerly stepped into the controversy, holding first that they did have jurisdiction over events at Gitmo, followed by evaluation of claims that habeas corpus did not apply. In this legal climate the Administration stalled, fighting on every legal point. The Bush team also slowly moved toward the use of military commissions to try enemy combatants in highly controversial procedures. Vigorous defense of prisoners by their lawyers again caused the process to move slowly, in fits and starts. Like in the federal courts, the military commissions had resolved very little by the time of this paper's writing.⁸³

79. See Memorandum from Christopher Anders, ACLU Legislative Counsel, ACLU Interested Persons Memo on FBI Documents Concerning Detainee Abuse at Guantanamo Bay (12 July 2005), available at <http://www.aclu.org/safefree/general/19913leg20050712.html>.

80. See generally Human Rights First, available at <http://www.humanrightsfirst.org/index.asp>.

81. THE TORTURE PAPERS, *supra* note 20, at 558.

82. For a roundtable discussion with Scott Horton, see *Accounting for Abuse* (PBS television broadcast, 25 Aug. 2004), available at http://www.pbs.org/newshour/bb/military/july-dec04/abughraib_8-25.html.

83. Crook reviews the Hamdi and Rasul cases, as well as the matter of military commissions. John R. Crook, *Treatment of U.S. Detainees at Guantanamo Bay, Supreme Court Litigant Released to Return to Saudi Arabia*, 99 AM. J. INT'L L. 261, 261–62 (2005).

V. INTERNATIONAL REACTION

Needless to say, the Bush policy toward enemy detainees contributed to a highly negative reaction in the Arab-Islamic world and amongst virtually all European publics, as well as in other circles already alarmed by the prospect of unchecked US power.⁸⁴ Some insurgents in Iraq carried reproductions of the Abu Ghraib pictures of abuse when they were apprehended, which is clear evidence that widespread knowledge of prisoner mistreatment made the US role in the world more difficult.⁸⁵

At the same time, the British, Swedish, Canadian, and certain other governments also engaged in rendition⁸⁶ and may have cooperated in abusive interrogation at Gitmo. A certain governmental sympathy for US policy existed abroad, despite public opinion.⁸⁷

The UN system reacted in various ways on this topic, especially through its secretariat officials. They, however, had little impact on the Bush Administration, predisposed as it was to dismiss most UN initiatives that interfered with its desired policies.⁸⁸ As a general rule, UN criticism of Washington is taken less seriously than congressional criticism or US court action.

The UN High Commissioner for Human Rights made a number of statements about US treatment of enemy detainees through Mary Robinson, Bertie Ramcharan, and Louise Arbour.⁸⁹ However, none of these statements seemed to have any impact on Washington.

A group of UN human rights experts, related either to monitoring bodies of particular treaties or to the UN Human Rights Commission or to its Sub-Commission, expressed concern about the reports of abuse at Gitmo, Afghanistan, and Iraq. From 2004, they requested that certain UN human

84. In 2005, a poll of citizens found that in Britain and France, China rated more favorably than did the United States. Favorable views of the United States were 38 percent in Indonesia, 23 percent in Pakistan, and 23 percent in Turkey. Associated Press, *Poll: U.S. Image in Tatters Abroad*, 23 June 2005, available at <http://www.cbsnews.com/stories/2005/06/23/world/main703813.shtml>.

85. Neil MacFarquhar, *Lebanese Would-Be Suicide Bomber Tells How Volunteers Are Waging Jihad in Iraq*, N.Y. TIMES, 2 Nov. 2004, at A11.

86. See Human Rights Watch, *UK: Promises on Torture Don't Work: "Diplomatic Assurances" Will Not Protect Deportees*, 6 Oct. 2004, available at <http://www.hrw.org/english/docs/2004/10/06/uk9459.htm>.

87. It is unlikely that secret CIA interrogation centers could have existed in Europe or that the CIA used European air space and airports for renditions without some knowledge and cooperation by at least some European security managers.

88. See, e.g., John H. Cushman, Jr., *U.N. Condemns Harsh Methods In Campaign Against Terror*, N.Y. TIMES, 28 Oct. 2004, at A13. This refers to comments by Theo van Boven, UN Special Rapporteur on Torture.

89. Mary Robinson criticized US detainee policies on Australian television. See Interview with Mary Robinson (SBS Television Broadcast, 31 Aug. 2005), available at <http://news.sbs.com.au/dateline/index.php?page=archive&daysum=2005-08-31>. Similarly, Louise Arbour criticized the policies on BBC. See BBC News, *UN Renews US "Torture" Criticism, Top UN human rights official Louise Arbour has repeated accusations made earlier this week that the US and other countries are easing curbs on torture*, 9 Dec. 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4514958.stm>.

rights experts be allowed to visit especially Gitmo. For a time, Washington stalled in dealing with this request but later agreed to permit a visit to Gitmo, although prisoners could not be interviewed. The UN officials in question refused to visit under those conditions.

International human rights groups played important roles in keeping the issue alive. It is impossible to track all NGO activity related to this subject. However, some examples are worth noting. Particularly important was a long and detailed report by Amnesty International (AI) in November 2004.⁹⁰ AI's release of its Annual Report in 2005 led to much controversy, stemming in part from the fact that AI used the word "gulag" to refer to Gitmo.⁹¹ These semantics brought publicity to the issue but also allowed the Bush Administration and its friends to deflect the debate away from its policies and toward AI's judgment and reliability.

Human Rights Watch also produced many reports on US policy, including a major report about US command responsibility for prisoner mistreatment.⁹² Human Rights Watch repeatedly called for an independent inquiry into the subject, given the limits and weaknesses of both DOD reports and congressional oversight. While congressional commentary picked up by 2005, there was no movement toward an independent investigation by the Bush team.

The Center for Constitutional Rights worked with some former detainees at Gitmo to bring charges in a German court under the principle of universal jurisdiction. The defendants were Secretary of Defense Rumsfeld and others. However, German authorities dismissed the suit.⁹³

All of this NGO activity, when linked to media reports and congressional actions, may have generated some pressure on the Bush Administration to restrict the scope of coercive interrogation at US military facilities.⁹⁴

90. AI, HUMAN DIGNITY DENIED, *supra* note 41. The report, not terribly well organized, consists of 118 pages and 771 reference notes.

91. See Editorial, *When Amnesty International Recklessly Calls Guantanamo a "Gulag," It's All Too Easy for Bush to Dismiss*, PITTSBURGH POST-GAZETTE, 3 June 2005.

92. HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE?: COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES, *supra* note 17. It consists of ninety-three pages and 374 reference notes.

93. See Center for Constitutional Rights, *Center for Constitutional Rights Seeks Criminal Investigation in Germany into Culpability of U.S. Officials in Abu Ghraib Torture*, available at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1xiADJOOQx&Content=472 (providing an overview of the case).

94. Lelyveld examines a new US military manual on interrogation and a US report to the UN Committee against Torture. See Lelyveld, *supra* note 42.

A. The International Committee of the Red Cross (ICRC)

The one organization outside the US government that is aware of the details of events at Gitmo and in Afghanistan and Iraq is the ICRC.⁹⁵ This founding agency of the International Red Cross and Red Crescent Movement focuses exclusively on armed conflict and internal unrest. It has a mandate to engage in humanitarian protection, which includes protecting the human dignity of prisoners during times of war and unrest. Under the Third and Fourth Geneva Conventions, it has a right to visit detainees in international armed conflict, in order to observe and comment on whether IHL is being properly implemented.⁹⁶ It has a right to offer its services in civil wars and domestic unrest, in which case the visitation process can be almost the same as in international wars.

The specifics of what the ICRC is doing, how, and with what success, is difficult to say. Since 1863, the ICRC prides itself on its independence, neutrality, and impartiality in its humanitarian work. These guiding standards do not preclude public comment, but discretion is its preferred mode of operation. Its basic approach to violations of human dignity is not covered in IHL but is spelled out in one of its Doctrines, or general policy statements, Number 15—first articulated in 1981 and refined in 2005.⁹⁷

It normally does not make public comment about the details of what its delegates observe, because in its view this confidentially promotes access, trust, and leads over time to positive developments. It may share detailed information confidentially with certain third parties in the quest for humanitarian improvements. It may make public statements and even public denunciations if discreet diplomacy does not yield significant progress over time and if such publicity is judged to be in the interest of the victims themselves. Other Doctrines, such as Number 58, allow the ICRC to make public comment for other reasons, such as to correct partial or inaccurate reports about its role.⁹⁸

The Bush Administration, while resisting the application of IHL to Gitmo, did nevertheless allow for an essentially permanent presence there by the

95. The ICRC is a private Swiss association, part of Swiss civic society. But it is recognized in public international law and given certain rights in IHL. It is treated by the Swiss government now, and by most governments, as if it were a public international organization or intergovernmental organization. See DAVID P. FORSYTHE, *THE HUMANITARIANS: THE INTERNATIONAL COMMITTEE OF THE RED CROSS* (2005).

96. Geneva Convention III, *supra* note 7, art. 126; Geneva Convention IV, *supra* note 7, art. 143.

97. *Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence*, in INT'L REV. RED CROSS 858, 393 (2005).

98. Doctrine 58, like most ICRC doctrinal statements, has never been published as a separate statement. But it has been referred to in many ICRC explanations about its activities. See FORSYTHE, *THE HUMANITARIANS*, *supra* note 95.

ICRC from early 2002. The reasoning for this remains unclear, because during the same time, the Bush team began implementing a policy of abusive interrogation that violated the relevant international standards. It may be that Washington wanted to give a humanitarian gloss to an inhumane policy, anticipating that under the preferred confidentiality of the organization, it could safely ignore any inconvenient comments. After all, the ICRC has been a presence in Israel and the occupied territories since 1967, and yet a certain Israeli abuse of Palestinian detainees is well known, at least until the 1999 Israeli Supreme Court ruling that prohibited "moderate" physical and psychological pressure, or torture lite.⁹⁹ Or it may be that Washington wanted the ICRC to serve as an independent auditor for its policy of limited and controlled abuse, telling Washington when things were going out of control but not seriously interfering with the interrogation of high value prisoners. After all, if the Administration received good marks on most issues, would not the organization stay, and stay silent, about a few rough edges? Or it may be that Washington only progressively moved toward systematic prisoner abuse at Gitmo during the course of 2002, not having fully decided on that policy when the first permission to visit was granted to the ICRC.¹⁰⁰

The ICRC did not agree that IHL was inapplicable to at least some of the Gitmo detainees.¹⁰¹ Consistent with its preferred policies, however, it did not engage in protracted and acerbic legal debate in public, especially because it was active on the ground at Gitmo on practical matters of humanitarian protection.

In May 2003, the ICRC went public about the deleterious effect of indefinite detention without prospect of charge or trial at Gitmo. It did so in a fairly low key way, which is typical of the organization; that is, the IRC posted a statement on its web site and allowed the head of the ICRC Washington office to eventually give an interview to *The New York Times*, saying the same thing as posted. More than thirty Gitmo detainees had attempted suicide, given their despair.¹⁰² The fact that the United States was the largest

99. See Lelyveld, *supra* note 42.

100. The flurry of memos by US civilian and military authorities about what types and categories of interrogation techniques were permitted for use on enemy detainees did not occur until the fall of 2002. Also, it was in the second half of 2002 when FBI agents complained about military interrogation at Gitmo. See *THE TORTURE PAPERS*, *supra* note 20. See also Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, 6 Jan. 2005, at A1.

101. Press Release, International Committee of the Red Cross Geneva Convention on Prisoners of War (9 Feb. 2002). Some of the Gitmo detainees had no connection with Afghanistan and the armed conflict there but rather were seized in places such as Bosnia, Macedonia, etc.

102. According to the BBC, citing US military sources, more than thirty-four prisoners at Gitmo have attempted suicide since January 2002. BBC, *Mass Guantanamo Suicide Protest, Twenty-three prisoners tried to hang or strangle themselves during a mass protest at Guantanamo Bay in 2003, the US military has revealed*, 25 Jan. 2005, available at <http://news.bbc.co.uk/2/hi/americas/4204027.stm>

donor to the ICRC budget and had been for some time, providing about 28 percent of the wherewithal for ICRC operations around the world in 2004 and 2005,¹⁰³ did not affect the policy of the organization on this issue. Nor had donor status affected ICRC support for the Ottawa Treaty banning anti-personnel land mines, which the US opposed.

It is documented that from 2002 to 2004, the ICRC lodged numerous private protests about certain US policies at Gitmo, involving such things as the treatment of detainees under the age of eighteen; the lack of prayer mats and Korans; the abuse of Korans by interrogators; the sexual humiliation of prisoners; the use of medical records by interrogation teams, which constituted a violation of medical ethics; and other US actions that in some cases were "tantamount to torture." At times the ICRC was prevented from seeing some detainees.¹⁰⁴ On some issues the ICRC representatives on the scene judged the policies serious enough to warrant a temporary suspension of visits, although no public statement was made.¹⁰⁵

ICRC President Jakob Kellenberger went to Washington three times and, in February 2005, met with high administration officials, including President Bush, to discuss Gitmo, along with Afghanistan and other subjects. Kellenberger also carried on persistent discussion about Gitmo and other IHL issues with the US diplomatic mission in Geneva. Thus, there was high-level ICRC quiet diplomacy aimed to effectuate change in keeping with international norms for human dignity.

However, outside observers do not know the exact Gitmo balance sheet of improvements and remaining problems. Nor do they know the details of the ICRC cost-benefit analysis about staying or leaving with a public protest. Reports about abuse of the Koran seemed to stop in mid-2003. Similarly, the use of female interrogators sexually humiliating detainees by, for instance, wearing provocative clothing and pretending to smear menstrual blood on prisoners, seemed to stop, perhaps because it simply was not working. By 2005 Gitmo served mostly as a holding center, with little new interrogation occurring.

We certainly do not know if the ICRC asked the Gitmo detainees if it should stay or go with a protest. The organization sometimes poses this question to prisoners; and if they want the ICRC to continue with confidential

103. See generally ICRC, *ANNUAL REPORT*, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/section_annual_report_2004?OpenDocument.

104. ICRC visits may be delayed for "military necessity," but this is supposed to be temporary. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 143, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956). In some cases at Gitmo, the ICRC was denied visits to certain individuals for months.

105. See generally MICHAEL RATNER & ELLEN RAY, *GUANTANAMO: WHAT THE WORLD SHOULD KNOW* (2004). See Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, 30 Nov. 2004, at A1, which is based on an ICRC report leaked by a US source.

visits, which give the prisoner a sole contact with the outside world, the ICRC can hardly do otherwise—even if humanitarian progress is slight to nonexistent.

Contrary to the assumptions of some observers, there has been some beneficial change at Gitmo over time, stimulated by ICRC quiet diplomacy; but outsiders know little about that change. Kellenberger said in a press conference in 2005 that at Gitmo, the organization had achieved progress on some issues, although all of its requests had not been met by US authorities.¹⁰⁶ This type of mixed record is usually enough for the ICRC to continue with its discreet diplomacy, at least where it can see some important progress. It takes a lot of abuse by detaining authorities to make the ICRC lodge a public, specific protest, and walk away. The organization is very cautious, following the advice of Nelson Mandela, who told the ICRC not to suspend its visits to Robben Island, because then the agency would not be in a position to prevent the bad that might occur if it left.¹⁰⁷ And if it leaves, it has used up the last arrow in its quiver and put itself on the sidelines, which also causes the ICRC to lose its comparative advantage over other human rights and humanitarian agencies, including its direct contact with victims inside prisons. Complicating matters is the ICRC's global role. Would speaking out about Gitmo jeopardize ICRC access to prisoners in other countries? The ICRC headquarters takes this kind of calculation into account, but we do not know the details of the process.

In Iraq, where the United States accepted the application of IHL in general, the process of prison visits was not that different from Gitmo. An ICRC staff member had been intentionally killed in summer of 2003; its headquarters in Baghdad was subsequently attacked that same fall. For these reasons, and given the continuing insecurity in the country after that time for expatriates, the organization brought in its visitation teams from Jordan for limited time spans. This created some problems, particularly delays in obtaining relevant information about detainee affairs. Interestingly, Geneva decided that the progress achieved by late fall 2003 was greater than in either Gitmo or Afghanistan. Higher authorities did not authorize much of the abuse at Abu Ghraib, even if in reality they were negligent about proper planning and supervision. Therefore, the US authorities in Iraq did not resist some of the changes demanded by the ICRC. But there were intentional policies of abuse also, such as the CIA disappearing persons, most of whom were abused

106. *ICRC Hits Back at US Senate Report, Saying it's Part of Smear Campaign*, AGENCE FRANCE PRESSE, 17 June 2005. See also Alexander G. Higgins, Associated Press, *International Red Cross Says U.S. Cooperation Good on Guantanamo Despite Critics*, 17 June 2005.

107. For references to the Mandela statement about the importance of continuing ICRC visits and information from interviews in Geneva, see FORSYTHE, *THE HUMANITARIANS*, *supra* note 95.

in one way or the other, and at least one of whom died in captivity.¹⁰⁸ Also, there was slow US action at times in response to ICRC reports, and on at least one occasion, a US officer proposed that ICRC visits be announced in advance so as to not interfere with coercive interrogation.¹⁰⁹

This being so, some ICRC officials in both Iraq and Geneva wanted more than quiet suspension of ongoing visits. They wanted a strong public protest. But once again, ICRC headquarters, after much debate, decided in favor of discretion. A leaked ICRC report about Iraq, published in *The Wall Street Journal*, did not come from ICRC sources but probably from dissidents within the US Executive.¹¹⁰ And even a certain faulty follow-up to ICRC reports by US authorities in the fall of 2003 did not occasion a radical change of plan by Geneva.¹¹¹ By the time of Kellenberger's meetings with Bush, Rice, and Rumsfeld, among others, in February 2005, Iraq was not the top agenda item, but rather Gitmo and Afghanistan. Many of the changes in Iraq were of course ushered in by the infamous pictures of Abu Ghraib that circulated and not because of the ICRC confidential reports. Nevertheless, as at Gitmo, there was a certain progressive change over time, perhaps more so in Iraq than at Gitmo, on these humanitarian questions. In both places, as the ICRC had reported privately, most of the detainees were nonpolitical. Thus eventually a number of releases occurred.

In Afghanistan, there were numerous credible reports of detainees being abused while in US captivity, whether at the Bagram or Khandahar military bases, at regional bases, or at smaller holding centers. Somewhere around twenty fatal cases of prisoner abuse were being investigated at the time of this writing. From the beginning, it was clear that the ICRC did not have immediate access to all detainees in all detention facilities. US prisoner policy in Afghanistan was a subject of high level ICRC diplomacy with US leaders on several occasions.

VI. SUMMING UP

On the one hand, some US policy after 11 September 2001 toward enemy detainees was more humane than the French policy during the Algerian war. At least in military installations, the United States authorized torture lite rather than torture heavy. It coerced and abused a sizable percentage of those pris-

108. *AI, HUMAN DIGNITY DENIED*, *supra* note 41, at 8.

109. *Id.* at 54.

110. For the report, see *THE TORTURE PAPERS*, *supra* note 20, at 383.

111. The Fay report notes that US military authorities did not always take ICRC reports seriously or investigate the allegations properly. GEORGE R. FAY, U.S. DEPT. OF ARMY, REG. 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE 34 (2004), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

oners, but it did not pull out fingernails as a matter of military policy, then use summary executions to dispose of the incriminating evidence. It is not clear what policies were applied to the disappeared kept in secret locales or against prisoners who were rendered to other states. Torture heavy was more likely there. The United States, like France in the past, was faced with what to do with prisoners who had been abused; one could not put them on trial and let them testify about their conditions of detention.

On the other hand, the United States gravely damaged its reputation as a champion of human rights, humanitarian norms, and the rule of law, just as was true for the French from 1954 to 1962. The United States, just as France, has gravely undermined its own standing in global attempts to legally protect human dignity. The driving justification or motivation remained the same, namely, the necessity of protecting a superior nation.

One can imagine that the next time the US government engages in quiet diplomacy toward another state about torture, it will be similar to when a British diplomat talked to a Nazi official about the German concentration camps. The Nazi pulled off his shelf an account of the British concentration camps in the Boer War, in which almost 30,000 persons died, mainly women and children.¹¹² End of discussion.

But the American polity shows little inclination to do what Human Rights Watch has called for: create a special prosecutor and/or special commission to examine the origins of prisoner abuse at the highest levels, military and civilian, so as to correct the impunity now existing for such officials. This investigation of high policy makers, as Sartre noted long ago, is agonizing and requires great courage. The French were not up to it, and it does not seem that the Americans are either. As a perceptive journalist concluded, the public and Congress agreed during the period from 2002 to 2004 that "the less we know as a people about our secret counterterrorism struggles and strategies, [and] the less we contemplate the possibly ugly consequences, the easier it will be for those in authority to get on with the job of protecting us."¹¹³ Whether the open debate about torture in the fall of 2005 will change things remains to be seen.

Thus far, the necessity of protecting the nation trumps the legal standards for protecting human dignity. At least it seems that high policy makers intended to limit the necessary abuse, although that policy was badly articulated and managed. The abuse spread widely. And at times it was torture heavy, with fatalities as proof.

112. FERGUSON, *supra* note 9, at 232–33. The British tortured in Aden and Cyprus; Northern Ireland has already been mentioned. See KIRSTEN SELLARS, *THE RISE AND RISE OF HUMAN RIGHTS* (2002).

113. Lelyveld, *supra* note 42, at 41.

US nationalism after 11 September 2001 has been less intolerant than some periods in US history; the Wilson and McCarthy eras quickly come to mind. But perhaps that is due to the lack of open, vigorous debate and dissent about Bush's security policies. Given this lack of serious domestic debate, the Bush Administration has been able to sustain its policy of abusive interrogation, even if it has had to clean up detention practices in military facilities. International criticism has been much less important than domestic factors, although the role of the ICRC is not without importance.

The situation is not totally new, not only by comparison to France in Algeria. During the Cold War, the United States then too spoke of freedom and human rights and the rule of law but acted in the shadows to overthrow elected governments and back murderous allies, as in Chile and Guatemala. But to paraphrase Satre in the earlier quote, why should Americans go to such trouble to be patriots if their country in reality stands for torture and other serious violations of fundamental human rights? The French have much to say on the subject.